85-1839
(3)

No. 85-

Supreme Court, U.S.
FILED
JUN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

---

BERRY GALLON,

*Petitioner,*

v.

LEVIN METALS CORP., a California Corporation, and INDUSTRIAL, IRON AND METAL PROCESSING WORKERS UNION, LOCAL 1088,

*Respondents.*

---

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

ALLEN J. BERK
*(Counsel of Record)*
MICHELE A. BALLARD

Pettit & Martin
101 California Street
San Francisco, CA 94111
(415) 434-4000

*Attorneys for Respondent*
LEVIN METALS CORPORATION

June 1986

12pp

## QUESTION PRESENTED

Was the Court of Appeals correct in holding that the statute of limitations for filing a complaint and serving notice of a breach of collective bargaining agreement/violation of the duty of fair representation claim in state court is the six-month period provided under section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), rather than any longer period provided under either The California Code of Civil Procedure or The Federal Rules of Civil Procedure?

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTE INVOLVED | 2 |
| STATEMENT | 2 |
| REASONS FOR DENYING THE WRIT | |
| I. There Is No Conflict With the Decision of Another Federal Court of Appeals Regarding Whether the Limitations for Service of Process in a Breach of Contract/Duty of Fair Representation Claim Is Governed by § 10(b) of the National Labor Relations Act Where the Original Complaint Was Filed in State Court | 3 |
| II. If This Court Grants Petitions for Certiorari for *Continental Baking Co.* v. *Macon* or *West* v. *Conrail,* This Case Should Not Be Held Pending Decisions in Those Cases Nor Consolidated With Them | 6 |
| CONCLUSION | 7 |

## TABLE OF AUTHORITIES

CASES: PAGE

*Charles Dowd Box Co.* v. *Courtney,* 368 U.S. 502 (1962) ..... 3

*Del Costello* v. *Teamsters,* 462 U.S. 151 (1983) ..... 2, 3, 5, 6, 7

*Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938) ..... 4

*Macon* v. *Continental Baking Co.,* 779 F.2d 1166 (6th Cir. 1985), *petition for cert. filed,* 54 U.S.L.W. 3584 (U.S. Mar. 4, 1986) (No. 85-1400) ..... 4, 6, 7

*Simon* v. *Kroger Co.,* 105 S.Ct. 2155 (1985) ..... 4, 5

*United Parcel Service, Inc.* v. *Mitchell,* 451 U.S. 56 (1981) 5, 6

*Vaca* v. *Sipes,* 386 U.S. 171 (1967) ..... 3

*West* v. *Conrail,* 780 F.2d 361 (3d Cir. 1985), *petition for cert. filed,* 54 U.S.L.W. 3744 (U.S. May 13, 1986) (No. 85-1804) ..... 4, 6, 7

STATUTES:

California Code of Civil Procedure

Section 583.210 ..... 5

Federal Rules of Civil Procedure

Rule 4 ..... 4, 5

National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*

Section 10(b), 29 U.S.C. § 160(b) ..... i, 3, 4, 5, 6

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

---

BERRY GALLON,

*Petitioner,*

v.

LEVIN METALS CORP., a California Corporation, and INDUSTRIAL, IRON AND METAL PROCESSING WORKERS UNION, LOCAL 1088,

*Respondents.*

---

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Levin Metals Corporation hereby submits this brief in opposition to Berry Gallon's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The decision of the District Court, which is not reported, is set forth at pages 5a to 7a of the Appendix to the Petition for a Writ of Certiorari. The Court of Appeals opinion is reported at 779 F.2d 1439 and is set forth at App. 1a to 4a of the Petition.

## JURISDICTION

Respondent accepts petitioner's statement of the Court's jurisdiction.

## STATUTE INVOLVED

Respondent accepts petitioner's statement of the statute involved.

## STATEMENT

Petitioner Berry Gallon ("Gallon") was laid off by respondent Levin Metals Corporation ("Levin Metals") on March 1, 1983. Gallon failed to file a written grievance protesting this action within 48 hours as specifically required by the collective bargaining agreement between respondent Industrial Iron & Metal Processing Workers Union, Local No. 1088 ("Union"), and Levin Metals. The petitioner claims (although the Company denies the incident took place) that on September 24, 1983 he learned that his layoff was considered a discharge by Levin Metals. However, petitioner again failed to file a grievance within 48 hours of that date. Instead, Gallon attempted to file a grievance more than one year after the initial Company action, on March 13, 1984. Eight days later, on March 21, 1984, Gallon filed a complaint in state court against Levin Metals and the Union regarding the Company's and Union's actions relating back to his March 1, 1983 layoff. That complaint alleged a breach of the collective bargaining agreement by Levin Metals and a breach of the duty of fair representation by the Union. The complaint was not served on the Union until March 28, 1984, and on Levin Metals until April 13, 1984.

After service respondents removed the matter to the United States District Court for the Northern District of California, which then granted respondent's motion for summary judgment and dismissed the complaint as untimely. It should be noted that, for the purposes of the summary judgment motion, the District Court accepted petitioner's allegation that the statute of limitations six-month period did not begin to run until September 24, 1983 (when the petitioner allegedly learned of his discharge) and, therefore, the complaint had been filed within the period mandated by this Court in *Del Costello* v. *Teamsters,* 462 U.S. 151 (1983). However, the District Court held that *Del Costello's* six-month limitations

period, derived from § 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), applies to service of process as well as filing of a complaint and Gallon's complaint was therefore untimely, since the limitations period expired on March 24, 1984. Pet. App. 6a.

The United States Court of Appeals for the Ninth Circuit affirmed, noting that the balance between "national interests in stable bargaining relationships and finality of private settlement, and an employee's interest in setting aside what he views as an unjust settlement" applies equally well to service requirements as to filing requirements. Therefore, the Ninth Circuit held that this Court in *Del Costello* intended to adopt § 10(b) of the NLRA *in toto*, which includes service of process within its six-month limitations period. Pet. App. 3a.

## REASONS FOR DENYING THE WRIT

### I. THERE IS NO CONFLICT WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS REGARDING WHETHER THE LIMITATIONS PERIOD FOR SERVICE OF PROCESS IN A BREACH OF CONTRACT/DUTY OF FAIR REPRESENTATION CLAIM IS GOVERNED BY § 10(b) OF THE NATIONAL LABOR RELATIONS ACT WHERE THE ORIGINAL COMPLAINT WAS FILED IN A STATE COURT.

It would be improvident to grant petitioner's writ because there is no conflict with the decision of another Federal Court of Appeals regarding resolution of the question presented in this case. Because there is concurrent federal/state jurisdiction for breach of contract/duty of fair representation claims, *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962), this case raises a unique issue that has not been confronted by any other United States Court of Appeals. In determining the appropriate limitations period for service of process, the Ninth Circuit not only had to decide between § 10(b) of the NLRA and the Federal Rules of Civil Procedure, but also between either of those alternatives and the California Code of Civil Procedure. This distinction is important because the implications of adopting any other alternative

to the choice that the Ninth Circuit actually made in *Gallon* are clearly different when the original complaint is filed in a state court rather than a federal court.

Justices who have advocated not following § 10(b) of the NLRA for service of process have quite clearly indicated that the acceptable alternative would be Rule 4 of the Federal Rules of Civil Procedure and they have argued accordingly. *See, e.g., Simon* v. *Kroger Co.,* 105 S.Ct. 2155 (1985) (denial of cert. with three justices dissenting). The same alternative was clearly the basis for the federal courts of appeals decisions relevant to the instant issue. *Macon* v. *Continental Baking Co.,* 779 F.2d 1166 (6th Cir. 1985), *petition for cert. filed,* 54 U.S.L.W. 3584 (U.S. Mar. 4, 1986)(No. 85-1400); *West* v. *Conrail,* 780 F.2d 361, 364 (3d Cir. 1985), (Gibbons, J., dissenting), *petition for cert. filed,* 54 U.S.L.W. 3744 (U.S. May 13, 1986) (No. 85-1804). However, all of those cases involved suits initially filed in federal court. For example, in dissenting to a denial of a petition for a writ of certiorari in *Simon* v. *Kroger Co.,* 105 S.Ct. 2155 (1985) (White, J., dissenting), Justice White, joined by Justices Brennan and Marshall, objected to not hearing arguments that the limitations period on service in Rule 4 of the Federal Rules of Civil Procedures was more appropriate than the limitations period in § 10(b) of the NLRA. Justice White stated that "[i]n practical effect the Eleventh Circuit's ruling shortens the 6-month period by the amount of time necessary to effect service *under the Federal Rules,*" 105 S.Ct. at 2156 (emphasis added).

However in the *Gallon* case, if the Ninth Circuit had chosen to apply the Federal Rules of Civil Procedure, it would have been imposing federal procedural rules on a state court action. Clearly, adopting that alternative would have intruded unnecessarily on the "autonomy and independence of the state." *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64, 78 (1938). Further, it would have unquestionably created new and difficult legal issues such as whether breach of contract/duty of fair representation claims filed in state courts would require such courts to follow other federal procedural rules as well with regard to form of the summons, the method of process, or, for that matter, any other federal procedural requirement established in the Federal Rules of Civil Procedure.

On the other hand, if the Ninth Circuit had chosen the alternative of applying state rules of civil procedure to breach of contract/duty of fair representation claims it would have ignored the teaching of this Court in *Del Costello* that "state statutes of limitation can be unsatisfactory vehicles for the enforcement of federal law." 462 U.S. at 161. In particular, this Court has stated that:

> In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. . . . Accordingly, '[t]he need for uniformity' among procedures followed for similar claims [citation omitted], as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this [*United Parcel Service Inc.* v. *Mitchell,* 451 U.S. 56, 70-71 (1981)(Stewart J., concurring)].
>
> *Id* at 171.

In dissenting to a denial of certiorari in *Simon,* Justice White appeared to be advocating the possibility of extending the limitations period on service by the one hundred and twenty days allowed under Rule 4(j) of the Federal Rules of Civil Procedure. 105 S.Ct. at 2156. However, it is critical to note that the limitations periods for state service of process are often much longer. For example, in California, where Gallon brought his claim, there is a three-year limitations period on service after the filing of the complaint. Cal. Code of Civ. Pro. § 583.210. The fact that such extensive limitations periods are undesirable in situations such as the present matter was clearly articulated in this Court's *Del Costello* opinion, written by Justice Brennan and joined in by Justices White and Marshall, which noted that:

> This system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question *as much as* [*three*] *years later.* [*United Parcel Service,* 451 U.S. at 63-64.]
>
> 462 U.S. at 169 (emphasis added).

By adopting the limitations period on filing and service from § 10(b) of the NLRA, the Ninth Circuit chose an alternative that was minimally intrusive on state law while still furthering the national purposes behind the federal claims involved. Hence, in rejecting the procedural limitations periods on service of process contained in both the Federal Rules of Civil Procedure and the California Code of Civil Procedure, the Ninth Circuit resolved an issue not yet even presented to any other federal court of appeals. Thus, no conflict within the various federal courts of appeal exists with regard to the question presented in this case.

## II. IF THIS COURT GRANTS PETITIONS FOR CERTIORARI FOR *CONTINENTAL BAKING CO.* v. *MACON* OR *WEST* v. *CONRAIL*, THIS CASE SHOULD NOT BE HELD PENDING DECISIONS IN THOSE CASES NOR CONSOLIDATED WITH THEM.

If this Court grants petitions for certiorari for *Macon* v. *Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3584 (U.S. Mar. 4, 1986) (No. 85-1400), or *West* v. *Conrail*, 780 F.2d 361 (3d Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3744 (U.S. May 13, 1986) (No. 85-1804), the *Gallon* case should not be held pending decisions in those cases nor consolidated with them. Additionally, if certiorari is granted in this case, it should be argued and decided independently because, as noted above, a distinct and unique issue is involved. Plaintiffs in *Continental Baking* and *West* both initially filed suit in a federal district court while the plaintiff in this case initially filed suit in state court. For the reasons stated above, this distinction is critical and merits

separate treatment, especially since under The California Code of Civil Procedure the case could have been filed and not served for three years, thereby ignoring the basic thrust of this Court's *Del Costello* decision.

## CONCLUSION

The Petition for Certiorari should be denied, but if granted this case should not be consolidated with *Continental Baking* or *West* as it presents a unique and important issue regarding state court claims which does not exist in the other pending matters.

Respectfully submitted,

ALLEN J. BERK
*(Counsel of Record)*
MICHELE A. BALLARD

Pettit & Martin
101 California Street
San Francisco, CA 94111
(415) 434-4000

*Attorneys for Respondent*
LEVIN METALS CORPORATION